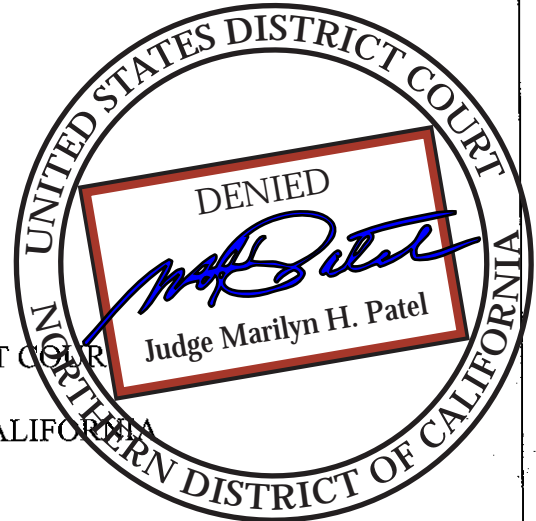


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UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

WILLIAM SCHECHNER and JOHN
LOBERTINI,

Plaintiffs,

v.

KPIX-TV, and CBS BROADCASTING,
INC.,

Defendants.

Case No. CV 08-05049 MHP

**PLAINTIFFS' MOTION FOR LEAVE
TO FILE A MOTION FOR
RECONSIDERATION OF THE
COURT'S JULY 15, 2010 DISMISSING
OF PLAINTIFFS' CLAIMS FOR WAGE
RELATED DAMAGES**

Complaint Filed: October 16, 2008
Date of Removal: November 5, 2008
Trial Date: No date set.

I. INTRODUCTION AND RELIEF SOUGHT

Plaintiffs William Schechner and John Lobertini ("Plaintiffs") bring this Motion based on Civil Local Rule 7-9(b)(3), pursuant to which a party may seek leave to file a motion for reconsideration of an interlocutory order where there has been a manifest failure to consider material facts or dispositive legal arguments. Plaintiffs respectfully request that the Court grant Plaintiffs leave to file a Motion for Reconsideration of the Court's Memorandum and Order of

July 15, 2010 (the "Order"), and specifically the Court's decision to grant Defendants' Motion for Summary Judgment with respect to Plaintiffs' prayer for lost wages. Because the Court's decision does not consider the material fact that Plaintiffs' claims for age discrimination (and the damages flowing from that discrimination) arise from *statute* rather than *contract*, the Court held that Plaintiffs' failure to offer evidence of their entitlement to "*contract-based damages*" was fatal to their prayer for lost wages. With all due respect, Plaintiffs submit that the Court's failure to consider the fact that Plaintiffs' Complaint does not state a cause of action sounding in contract was "a manifest failure to consider material facts or dispositive legal argument" such that Plaintiffs should be granted leave to file a motion for reconsideration under Civil Local Rule 7-9(b)3.

II. PROCEDURAL HISTORY

As the Court correctly noted in its Order, the parties fully briefed the issue of age discrimination under a theory of disparate treatment, but the remaining issues presented to the Court for summary judgment were only summarily addressed by the parties. Accordingly, the Court granted Defendants' Motion with respect to Plaintiffs' claims for disparate treatment, but prudently refrained from making a final ruling with respect to its denial of Defendants' Motion on Plaintiffs' disparate impact claims. Rather than denying Defendants' motion outright, the Court ordered additional briefing so that the issue "might be adequately addressed by the parties" prior to the Court's final ruling. Order at p. 15:19-24. Should the Court grant Plaintiffs leave to file a Motion for Reconsideration, Plaintiffs would ask that the Court afford Plaintiffs and Defendants a similar opportunity to more fully brief Plaintiffs' prayer for wage loss. This prayer, like Plaintiffs' claims for disparate impact, was addressed only summarily in the parties' papers. In their briefs, neither Defendant nor Plaintiff spent more than a paragraph arguing the merits of this prayer. Accordingly, the Court was presented with a dearth of legal or factual

1 argument on the issue of wage loss, just as it was presented with a dearth of argument with
2 respect to disparate impact.

3 **III. ARGUMENT**

4 Wage loss is a species of economic damage that can arise from claims sounding in
5 contract, tort or claims arising from statute. In contract based actions, wage loss is measured by
6 the benefit the aggrieved party would have received under the contract. Rest. 2d Contracts §
7 344. In contrast, where the party's wage loss arises from a tort or statutory claim, such as
8 wrongful termination on the basis of age, the aggrieved party's damages are not so easily
9 measured. One of the purposes of damages awarded in tort is to "put an injured person in a
10 position as nearly as possible equivalent to his position prior to the wrongful conduct." Rest.2d
11 Torts § 901.
12

13 Without the benefit of full briefing by the parties, the Court held that "plaintiffs have not
14 provided evidence that they are entitled to any *contract-based damages* for economic loss"
15 because the Plaintiffs had received the full benefit of their contract. Order at 15:24 – 16:2
16 (emphasis added). Plaintiffs did indeed fail to submit evidence that they were entitled to
17 contract-based damages because they are not seeking such relief. Instead, Plaintiffs seek
18 damages based in statute, under the Fair Employment and Housing Act ("FEHA"). Under a
19 FEHA claim for age discrimination, the fact that Defendants paid out Plaintiffs' contract is not
20 dispositive as to whether Plaintiffs' have suffered a wage loss as a result of their wrongful
21 termination.
22

23 Plaintiffs respectfully submit that the Court's ruling that Plaintiffs' failed to present
24 evidence of their entitlement to "*contract-based damages*" represents a failure to consider
25 material facts or dispositive legal argument because the Court failed to recognize that Plaintiffs
26
27
28

1 were seeking wage based damages pursuant to statute, not contract. This error was undoubtedly
2 due to the paucity of the parties' briefing on the issue.

3 **IV. CONCLUSION**

4 If allowed to submit additional briefing on this issue, Plaintiffs would offer the Court a
5 more fully fleshed out explanation of the distinction between damages flowing from a wrongful
6 termination based in statute or tort, and a termination stemming from breach of contract.
7 Similarly, Defendants would have the opportunity to bolster their position with additional
8 argument. Because Plaintiffs believe this additional briefing would allow the Court to reconsider
9 its ruling and correct a manifest error to consider material facts (that the claims asserted by
10 Plaintiff are *not* contract claims), Plaintiffs respectfully seek leave to file a Motion for
11 Reconsideration on the issue of Plaintiffs' wage loss.
12

13 Dated: August 4, 2010

McGUINN, HILLSMAN & PALEFSKY
Attorneys for Plaintiffs

14 By: /S/
15 John A. McGuinn
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